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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

<p>UNITED FIRE & CASUALTY COMPANY,</p> <p>Plaintiff,</p> <p>vs.</p> <p>KINKAID CIVIL CONSTRUCTION LLC,</p> <p>Defendant.</p>	<p>Cause No. _____</p> <p>PLAINTIFF’S COMPLAINT FOR DECLARATORY JUDGMENT</p>
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Plaintiff UNITED FIRE & CASUALTY COMPANY, by and through its
counsel, Matovich, Keller & Murphy, P.C., alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff United Fire & Casualty Company (“United Fire”) is a
corporation incorporated under the laws of the state of Iowa with its principal place

of business located in Cedar Rapids, Iowa. United Fire is authorized to do business in the state of Montana.

2. Defendant Kinkaid Civil Construction LLC (“Kinkaid”) is a limited liability company with one member, Tyson K. Borum and Jeffrie Borum Trust dtd 8/4/05. The trustees of the Tyson K. Borum and Jeffrie Borum Trust dtd 8/4/05 are Tyson K. Borum and Jeffrie A. Borum. Tyson K. Borum is a citizen of Arizona. Jeffrie A. Borum is a citizen of Arizona.

3. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1332, as the amount in controversy, excluding interest and costs, exceeds the sum of \$75,000 and this action is between citizens of different states.

4. Venue for this action is proper in the Billings Division of this Court, pursuant to Mont. Code Ann. § 25-2-121(2)(c), because any judgment obtained against Kinkaid in the underlying action would be in Yellowstone County, Montana where the underlying action was filed.

FACTS

5. This declaratory judgment action arises out of an underlying action entitled *Denny’s Electric & Motor Repair, Inc. v. Kinkaid Civil Construction LLC, The City of Billings and The Guarantee Company of North America, USA*, Cause No. DV-17-0355, filed in the Montana Thirteenth Judicial District, Yellowstone County. The underlying action was filed by Denny’s Electric & Motor Repair, Inc.

(“Denny’s”). Denny’s filed a First Amended Complaint and Demand for Jury Trial (“Amended Complaint”) in the underlying action on May 18, 2017. A copy of the Amended Complaint is attached as **Exhibit A**.

6. The Amended Complaint alleges the following:

- (a) On or about April 25, 2016, the City of Billings contracted with Kinkaid to provide labor, material and construction services for the Interstate 90 Water Main Crossing, City of Billings Project No. W.O. 16-07 (“Project”), in Billings, Montana. See *Amended Complaint*, ¶ 6 (**Exhibit A**).
- (b) Kinkaid and Denny’s entered into a Master Subcontract Agreement (“Subcontract”) on June 1, 2016, under which Denny’s agreed to perform horizontal directional drilling and boring work on the Project for a total payment of \$119,661.50. *Id.* at ¶¶ 10-12.
- (c) Denny’s performed the horizontal directional drilling and boring work from July 18, 2016 through August 1, 2016. Denny’s completed the work called for in the Subcontract on August 1, 2016, and left the jobsite. *Id.* at ¶¶ 13-14.

- (d) Denny's submitted two pay applications to Kinkaid on August 2, 2016. Pay Application No. 1 totaled \$113,678.43; Pay Application No. 2 totaled \$5,983.08. *Id.* at ¶ 15.
- (e) Kinkaid has failed to pay Denny's for the labor and materials it furnished on the Project pursuant to the terms of the Subcontract. *Id.* at ¶¶ 34-35.
- (f) Kinkaid breached the Subcontract by refusing to pay Denny's for the labor and materials it furnished pursuant to the Subcontract. *Id.* at ¶ 39.
- (g) Denny's suffered damages as a result of Kinkaid's breach of the Subcontract. *Id.* at ¶ 40.
- (h) Denny's seeks economic damages in the amount of \$119,661.50 for amounts owing under the Subcontract, plus interest, and attorney's fees and costs. *Id.* at p. 13-14 (Request for Relief).

7. United Fire issued Policy No. 60443715 to Kinkaid, effective March 15, 2016, to March 15, 2017 ("Policy"), which provided Commercial General Liability coverage in accordance with the terms and provisions of the Policy. A copy of the Policy is attached as **Exhibit B**.

8. The Policy does not provide coverage for the claims and damages

asserted in the Amended Complaint against Kinkaid in underlying action.

9. Kinkaid has tendered the defense of the Amended Complaint filed in the underlying action to United Fire, via its personal counsel.

10. United Fire has agreed to defend Kinkaid in the underlying action under a full reservation of rights.

11. An actual, justiciable controversy exists between the parties regarding whether the Policy provides coverage for the claims and damages asserted against Kinkaid in the underlying action.

12. United Fire is entitled to a judicial declaration that it does not have an obligation, contractual or otherwise, to defend or indemnify Kinkaid in the underlying action.

WHEREFORE, United Fire prays for the following relief:

1. For a declaration that the Policy described herein does not provide insurance coverage for the claims and damages asserted against Kinkaid in the underlying action;

2. For a declaration that United Fire has no duty to defend Kinkaid in the underlying action;

3. For a declaration that United Fire has no duty to indemnify Kinkaid for any settlement or judgment it may be legally obligated to pay in the underlying action;

4. That United Fire be awarded its costs of suit and attorney's fees as may be allowed by Montana law and/or the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-101, et seq.; and

5. For such other and further relief as the Court deems necessary and proper.

DATED this 31st day of July, 2017.

MATOVICH, KELLER, & MURPHY, P.C.

By: /s/ Katherine S. Huso
Katherine S. Huso
*Attorney for Plaintiff United Fire &
Casualty Company*